

NI

8-25

ASARO & KEAGY
ATTORNEYS AT LAW
304 KALMA STREET
SAN DIEGO, CALIFORNIA 92101
339-3861

(SPACE BELOW FOR FILING STAMP ONLY)

F. Robert D. L. E. D.
Robert D. L. E. D.

AUG 22 1978

A. ZMA, Deputy

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

GREMLIN INDUSTRIES,
a Delaware Corporation,

Plaintiff

vs.

CIRCLE INTERNATIONAL CO.,
INC., etc. et al.,

Defendants.

CASE NO. 416704

DECLARATION OF
H. FRANK FOGLEMAN

Date: August 24, 1978
Time: 1:30 p.m.
Place: Department 4

I, H. FRANK FOGLEMAN, declare as follows:

1. I am, and at all times material herein was, the President of GREMLIN INDUSTRIES, a Delaware Corporation and Plaintiff herein. That the following facts, I know them to be true of my own personal knowledge and if called and sworn as a witness in this matter, I could and would competently testify thereto.

2. That as President of GREMLIN INDUSTRIES (hereinafter referred to as Plaintiff) I am the person primarily in charge of all transactions with CIRCLE INTERNATIONAL CO., (hereinafter referred to as Defendant corporation) and have been for in excess of five years.

3. At the time Plaintiff entered into its oral agreement with the Defendant corporation in April of 1973, and without interruption, to this day, Plaintiff corporation has had as its principle place of business, located in San Diego County. During the three years subsequent to April, 1973, Plaintiff's place of business was located at 7030 Convoy Court, San Diego, California, 92117. Thereafter, Plaintiff's place of business is located at 8401 Aero Drive, San Diego, California, 92123. That during the respective time periods, these are the addresses of the place of manufacture and delivery of all goods sold to Defendant corporation and the addresses at which payment was to be received for those goods sold to Defendant corporation.

4. That on or about April, 1973, Plaintiff entered into an oral agreement with a representative of the Defendant corporation whereby Defendant agreed to purchase and to distribute the products manufactured by the Plaintiff. Under the terms of said agreement, Defendant would purchase goods manufactured by the Plaintiff and would thereafter resell said goods to various third parties. Said oral agreement of distributorship above-referred to, was entered into in San Diego, California by and between the President of Defendant corporation, DEAN MCMURDIE and myself as President of Plaintiff at Plaintiff's place of business on 7030 Convoy Court, San Diego, California.

5. From the inception of the above-referred to agreement of distributorship, the goods manufactured for the Defendant corporation were shipped to the Defendant corporation f.o.b. Plaintiff's place of business in San Diego, California. Attached

ASARO & KEAGY
ATTORNEYS AT LAW
1000 CALIFORNIA STREET
SAN DIEGO, CALIFORNIA 92101
339-3861

hereto, collectively marked Exhibit "A", and incorporated herein by this reference as though set forth in full, are true and correct copies of Plaintiff's invoices to Defendant corporation, all of which show on their face that the shipments were f.o.b. Plaintiff's factory in San Diego County. These

1 invoices are furnished as illustration only and do not
2 reflect each and every transaction where Plaintiff sent
3 goods to Defendant corporation. However, these invoices
4 illustrate that delivery of the goods sold to Defendant
5 corporation was to be accomplished in San Diego County and
6 that Plaintiff's obligations under the above-referred to
7 agreement were to be performed in San Diego County.

8 6. In addition, from the inception of the above-referred
9 to agreement of distributorship, Defendant corporation was
10 required to make payment to Plaintiff for the goods shipped
11 to Defendant at Plaintiff's place of business, San Diego
12 County. Specifically, Defendant corporation was obligated
13 to pay Plaintiff on a thirty-day account whereby Defendant
14 corporation was obligated to send to the Plaintiff at Plaintiff's
15 place of business in San Diego, California, payment for each
16 shipment of goods within thirty days after delivery of said
17 goods to Defendant corporation f.o.b. Plaintiff's factory
18 in San Diego, California. Plaintiff's invoices to Defendant
19 corporation, attached hereto as Exhibit "A", show that the
20 terms of payment was "NET 30" which in the industry means
21 payment for the goods shipped pursuant to said invoices to
22 be delivered to Plaintiff at Plaintiff's place of business
23 within thirty days from delivery. These transactions further
24 illustrate the fact that performance of Defendant's obligations
25 under the above-referred to agreement, namely the payment of
26 money, was to be made in San Diego County.

27 7. In addition, attached hereto, marked collectively
28 as Exhibit "B" incorporated herein by this reference as

ASARO & KEAGY
ATTORNEYS AT LAW
304 KALMA STREET
SAN DIEGO, CALIFORNIA 92101
239-3861

though set forth in full are true and correct copies of numerous invoices from the Plaintiff to Defendant corporation. The terms of said invoices were c.o.d. (cash on delivery) and invoices so marked were utilized by Plaintiff in its transactions with the Defendant corporation on and after December of 1977. By the terms of said invoices, the Defendant corporation was required to submit to the carrier its payment for the goods shipped immediately upon delivery of the merchandise to Defendant corporation and the carrier would transmit said payment to Plaintiff's place of business in San Diego, California. Said arrangement for the payment of the goods shipped by Plaintiff to Defendant corporation was made necessary because of Defendant corporation's repeated failure to submit payment to Plaintiff at Plaintiff's place of business within thirty days after shipment in accordance with the "NET 30" provisions in the subject invoices.

8. At no time whatsoever, did Defendant corporation object with respect to the manner of delivery of the goods, by Plaintiff, i.e. f.o.b. Plaintiff's factory, or with respect to the place at which Defendant corporation was to make payment to the Plaintiff for the goods delivered, i.e. at Plaintiff's place of business in San Diego County.

9. I am authorized to make this declaration for and on behalf of said corporation and I make this declaration for that reason.

I declare under penalty of perjury, that the foregoing is true and correct.

////

1 Executed at San Diego, California.

2 Dated: August 22, 1978

3
4 *H. Frank Fogleman*
5 H. FRANK FOGLEMAN
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ASARO & KEAGY
ATTORNEYS AT LAW
SAN DIEGO, CALIFORNIA 92101
859-3861